HON'BLE SHRI G.S. SINGHVI, THE CHIEF JUSTICE
AND
HON'BLE SHRI JUSTICE G.BHAVANI PRASAD

Writ Petition No.966 of 2006

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Between:

K.Srinivas Rao ……Petitioner.

And

IndusInd Bank Ltd.,
represented by its authorised
signatory, Secunderabad and others. ……Respondents.

:: O R D E R ::

Counsel for the petitioner : Sri K.Ramakrishna Reddy, Senior Advocate, with Sri B.Mahender Reddy.

Counsel for the respondents : Sri V.Venkataramana
for Sri Peri Prabhakar
Sri S.R.Ashok, Senior Advocate
with Sri Deepak Bhattacharjee

17th January, 2007

Per G.S. SINGHVI, C.J.

In this petition, the petitioner has prayed for quashing the auction of his property bearing Plot Nos.2 and 4 comprised in Survey No.124,

measuring 7,502 square yards situated at Gachi Bowli Village, Serilingampally Mandal, Ranga Reddy District, and sale certificate dated 5-12-2005 issued in favour of respondent No.5, M/s.Shubham Enterprises in furtherance of the proceedings initiated by IndusInd Bank Ltd. (hereinafter referred as 'the bank') for recovery of the amount due from M/s.Rank Industries Ltd. (respondent No.2).

The Facts:

Respondent No.2 is a public limited company engaged in the business of aqua culture. In October, 1995, Sri S.Jaidev, Managing Director of respondent No.2 requested the bank for providing bill discounting facility, which was duly accepted by the latter. As per the terms and conditions of sanction, the following collateral securities were furnished to the bank:

1) The Directors of the company pledged company shares having face value of Rs.2 Crores.
2) Sri S.Jaidev, Managing Director and the petitioner, who was one of the Directors of the company gave personal guarantees having net worth of Rs.39.33 lakhs and Rs.38.57 lakhs respectively.

Respondent No.2 availed bill discounting facility and instructed the bank to release Rs.2 Crores to M/s.Coastal Marine Products Pvt. Ltd., who was supposed to supply shrimps to respondent No.2. M/s.Coastal Marine Products Pvt. Ltd. drew hundies dated 16-4-1997, 21-4-1997, 29-4-1997 and 3-5-1997 for Rs.50 lakhs each. Thereafter, the bank released the amount of Rs.2 Crores. However, when the hundies were presented for collection, the same were dishonoured. Thereupon, the bank called upon Sri S. Jaidev, the petitioner and respondent No.2 to repay the amount of Rs.2 Crores. The bank tried to get respondent No.2's shares transferred in its name, but without

success. The bank sent complaints to the Securities Exchange Board of India, Hyderabad Stock Exchange and also wrote to the Registrar of Companies to take action for expeditious transfer of shares of respondent No.2 in its favour. The Registrar of Companies issued notice dated 28-4-1999 to respondent No.2 for transfer of the shares, but the latter did not respond. Similar effort made through the Regional Director, Company Law Board also proved futile.

After some time, the bank filed an application under Section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (for short, 'the 1993 Act') before the Debts Recovery Tribunal, Hyderabad (for short, 'the Tribunal') for recovery of Rs.2,90,80,078/- with interest at 22.75% per annum. In the application, which was registered as O.A.No.455 of 2000, the bank impleaded the following as party respondents:

1) M/s.Rank Industries Ltd., represented by its
Managing Director – earlier known as Rank Aqua Estates Ltd.,
Road No.1, Banjara Hills, Hyderabad.
2) S.Jaidev, aged 50 years, Managing Director,
Rank Aqua Estates Ltd., Road No.1,
Banjara Hills, Hyderabad.
3) K.Srinivasa Rao, Director, aged 48 years,
Rank Aqua Estates Ltd., Road No.1,
Banjara Hills, Hyderabad.
4) M/s.Coastal Marine Products Pvt. Ltd.,
No.6, Casa Blanca, Major Road,
Egmore, Chennai-600 008.

The Tribunal issued notice of the O.A. to the opposite parties (including the petitioner herein) at their addresses specified in the memo of parties. The notice issued to the petitioner was returned by the postal authorities with an endorsement "addressee not claimed for seven days". The Tribunal did not issue fresh notice, but after six months, it passed order dated 26-6-2003 for ex parte proceedings

against the petitioner. By an order dated 1-10-2003, the Tribunal allowed the application filed by the bank and declared that the opposite parties are jointly and severally liable to pay a sum of Rs.2,95,80,181/- with costs and current and future interest at the rate of 22.75% per annum with quarterly rests from the date of filing of the application till the date of realisation. Simultaneously, the Tribunal issued recovery certificate dated 1-10-2003 under Section 19(22) of the 1993 Act for a sum of Rs.6,44,18,997/-.

Soon after the passing of decree by the Tribunal, Recovery Officer, Debts Recovery Tribunal, Hyderabad (respondent No.3 herein) issued notice of demand dated 27-10-2003 to the opposite parties including the petitioner by describing them as defendants. The same appears to have been sent to the petitioner at the address specified in the original application filed by the bank. On 2-5-2005, counsel for the bank filed a memo before respondent No.3 stating therein that the defendants/certificate-debtors are trying to avoid the receipt of demand notice and, therefore, substituted service may be effected.

In the meanwhile, the bank filed an application under Section 19(12) of the 1993 Act for issue of orders of attachment and sale of the land in question. The same was registered as M.P.No.23 of 2005 in R.P.No.512 of 2003 in O.A.No.455 of 2000. In the affidavit filed by Sri G.U.B.Sharma, Assistant Vice-President of the bank in support of the application, it was averred that debtor No.3 (the petitioner herein) had full knowledge of the recovery proceedings and he was trying to alienate the properties in favour of third parties. On 7-6-2005, respondent No.3 issued two orders of attachment under 48 (Form No.16) and Rule 53 (Form No.17) of the Second Schedule to the Income Tax Rules, 1961 (for short, 'the 1961 Act'). In the orders of attachment, the petitioner's address was given as K.Srinivas Rao,

Director, Aged 48 years, Rank Aqua Estates Ltd., Road No.1, Banjara Hills, Hyderabad. On 17-8-2005, the representative of the bank filed memo along with original postal covers, which are said to have been returned unserved with the following remarks:

1) Rank Industries Ltd. – Left
2) K.Srinivas Rao - Left
3) S.Jaidev - Left
4) M/s.Coastal Marine Products Ltd. - No such company in the address.

On 9-9-2005, respondent No.3 issued proclamation of sale under Rule 52(2) of the Second Schedule to the 1961 Act. Once again, the petitioner's address was given as Road No.1, Banjara Hills, Hyderabad. The auction was conducted on 18-10-2005. Respondent No.5 gave highest bid of Rs.5,38,00,000/-. At the time of auction, the bank gave letter of consent to forego the value of the land over which high tension wire is said to be passing. On 23-11-2005, respondent No.5 filed a memo for deduction of Rs.96,42,314/- towards proposed road area and Rs.23,06,474/- towards deficit. On that very day, respondent No.3 passed an order for refund of Rs.93,49,600/- to respondent No.5 and directed that the remaining amount be released in favour of the bank.

When respondent No.3 applied for confirmation of the sale, the Tribunal sought clarification as to how the deduction was granted to respondent No.5 and whether it was legally permissible in view of the provisions contained in Rule 61 of the Second Schedule to the 1961 Act. On the next day i.e., 24-11-2005, the Presiding Officer of the Tribunal observed that there have been several irregularities in the auction and directed respondent No.3 to pass appropriate order. Thereupon, respondent No.3 passed order dated 25-11-2005,

whereby he cancelled the auction and directed that fresh proclamation be issued. However, on 28-11-2005, he reviewed the earlier order and confirmed the sale in favour of respondent No.5. On 5-12-2005, respondent No.3 ordered issue of sale certificate in favour of respondent No.5. For the sake of convenient reference, order sheets dated 23-11-2005, 24-11-2005, 25-11-2005, 28-11-2005 and 5-12-2005 on the file of respondent No.3 are reproduced below:

> **"23-11-2005**
>
> Claim petition dismissed (vide separate orders).
>
> Issue sale confirmation. Vide separate orders passed for refunding the amount as claimed by the auction purchaser. The applicant bank also gave consent for returning of the amount of Rs.93,49,600/- (Rupees Ninety Three Lakhs Forty Nine Thousand and Six Hundred only) to the auction purchaser Subham Enterprises.
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> Hence, place before Hon'ble Presiding Officer for issue of cheque for Rs.4,44,50,400/- (Rupees Four Crores Forty Four Lakhs Fifty Thousand and Four Hundred only) towards sale consideration for the schedule property after deducting the amount as entitled by the auction purchaser.
>
> The said amount is paid subject to all further legal proceedings and undertaking is also obtained from the applicant bank. Issue cheque for Rs.93,49,600/- (Rupees Ninety Three Lakhs Forty Nine Thousand and Six Hundred only) towards proportionate amount as claimed by the auction purchaser Subham Enterprises.
>
> Sd/-
> Recovery Officer.

a) The Recovery Officer may state under what powers of law the return of Rs.93,49,600/- is permissible?

b) Whether Sale Proclamation under Rule 53 of the II Schedule to the Income Tax Act, 1961 contains that the price for 2089 square yards will be refundable to the auction purchaser?

c) It is seen that there is an application filed by the auction purchaser for refund of amount and Recovery Officer may examine the same in the light of the provisions of Rule 61 of

the II Schedule and in the background of any irregularity of the conduct of the auction.

Sd/-
Presiding Officer.

24-11-2005

1. There is no provision for return of the auction purchase amount. However, the same has been put up for return in view of the No Objection by the applicant Bank.

2. The sale proclamation does not contain that the price of 2089 square yards will be excluded or refunded to the auction purchaser and in the light of the above there is a clear violation of Rule 53 of the Second Schedule to the Income Tax Act, 1961.

3. There is no bar in considering the application filed by the auction purchaser under Rule 61 of the Second Schedule to the I.T. Rules as there are serious irregularities in the auction.

Submitted to the Hon'ble Presiding Officer.

Sd/-
Recovery Officer.

The Recovery Officer may, if satisfied that there has been a serious irregularity in the conduct of the auction, pass order that maybe deemed fit and proper.

Sd/-
Presiding Officer.

25-11-2005

In view of the circumstances, there is an irregularity for not mentioning the refund of the amount for 2089 sq.yards in the proclamation of sale issued under Rule 53 and also as there is no provision for refund of the amount to the auction purchaser, it is necessary to set aside the sale under Rule 61 of the II Schedule to the Income Tax Act, 1961.

Hence, sale is hereby set aside.

Issue fresh proclamation of sale under Rule 52(2) of the Second Schedule to the Income Tax Act, 1961.

Place before Hon'ble Presiding Officer issuing cheque for Rs.5,43,38,020.00 (Rupees Five Crores Forty Three Lakhs Thirty Eight Thousand and Twenty only) in favour of the auction purchaser Subham Enterprises.

Sd/-
Recovery Officer.

28-11-2005

Letter received from auction purchaser and affidavit filed by the auction purchaser. Memo filed by applicant bank.

Vide separate order earlier order dated 25-11-2005 is hereby reviewed under Rule 87 of II Schedule of Income Tax Act, 1961 and sale conducted on 18-10-2005 for the scheduled property is hereby confirmed in favour of the auction purchaser M/s.Subham Enterprises on the basis of his representation not claiming the refund of amount.

Sd/-
Recovery Officer.

28-11-2005

Approved. Issue confirmation of sale.

Sd/-
Recovery Officer.

Auction Section may be directed not to issue cheque and it may be cancelled.

Sd/-
Recovery Officer.

5-12-2005

Issue sale certificate.

Sd/-
Recovery Officer."

On 16-1-2006, the petitioner filed an application before the Tribunal for setting aside ex parte decree dated 25-8-2003. He also applied for condonation of delay. In the affidavit filed by him, the

petitioner claimed that his address was wrongly shown in the original application filed by the bank as Road No.1, Banjara Hills, Hyderabad, whereas his residential address is Door No.310/2RT, Vijaynagar Colony, Hyderabad. He alleged that even though the bank is well aware of his residential address, the same was deliberately not mentioned in the original application and ex parte decree was obtained against him. He averred that he came to know about the ex parte decree only on 28-12-2005, the date on which he visited the property at Gachi Bowli. He then pleaded that the ex parte decree passed by the Tribunal and the consequential action taken by respondent No.3 are liable to be set aside.

Simultaneously, the petitioner filed this petition under Article 226 of the Constitution for quashing the auction proceedings conducted by respondent No.3 and the sale certificate issued by him by contending that the ex parte decree dated 25-8-2003 passed by the Tribunal in O.A.No.455 of 2000 is an end product of fraud played by the bank in connivance with the Managing Director of respondent No.2; that he was not served with the notice of the original application filed by the bank and the ex parte proceedings held against him are nullity; that he was not served with the notice of the orders of attachment and proclamation of sale issued by respondent No.3, and that the property was sold for a meagre price of Rs.5,38,00,000/- as against its market value of Rs.15 Crores. He has also questioned order dated 28-11-2005 passed by respondent No.3, by contending that respondent No.3 did not have the jurisdiction to pass such an order without issuing notice to the parties. According to the petitioner, the bank has manipulated sale of his property in connivance with the Managing Director, Sri S.Jaidev and no action was taken for recovery of the dues either by getting the share certificates of respondent No.2 transferred

or by auctioning the property of Sri S.Jaidev. In paragraph 5 of his affidavit, the petitioner has averred that his address was wrongly shown in the original application of the bank as Road No.1, Banjara Hills, whereas his residential address is Door No.310/2RT, Vijaynagar Colony, Hyderabad and that even though the authorities of the bank are well aware of his correct address, with a view to keep him in dark about the proceedings, his wrong address was deliberately given. To substantiate this, the petitioner has relied on the caveat petition filed by the bank before this Court wherein his address has been given as resident of 10-2-289,120/45, 310 RT, Vijaynagar Colony, Hyderabad. The petitioner has then averred that he came to know about the ex parte decree for the first time on 19-12-2005 when he visited the property at Gachi Bowli. In paragraph 7 of his affidavit, the petitioner has alleged that the Managing Director of respondent No.2 colluded with the officers of the bank and manipulated the sale of his property in question in a fraudulent manner. He has alleged that the demand notice and sale notice were not served on him as per the requirement of Section 28 of the 1993 Act and Rule 2 of the Second Schedule to the 1961 Act.

The case set up by the bank is that the application under Section 19 of the 1993 Act was filed after all the efforts made for transfer of the share certificates of respondent No.2 failed. In paragraph 7 of the affidavit dated 11-3-2006 filed by Sri Yogesh Goyal, Senior Vice-President of the bank, details of the efforts made by the bank for transfer of share certificates have been mentioned. In paragraphs 10 and 11 of his affidavit, Sri Yogesh Goyal has justified the sale of the petitioner's property by making the following averments:

> "10. I further submit that as the 1st respondent bank was not having any details of the personal properties of the

certificate debtors (petitioner, 2nd respondent, S.Jayadev), hence 1st respondent bank continued the efforts to trace and find out the assets owner by certificate debtors for execution of the recovery certificate.

11. I submit that after prolonged enquiries and great efforts the 1st respondent bank was able to trace out the property of the petitioner herein being plot No.1 and 3, situate at Gachi Bowli, Hyderabad, and immediately the 1st respondent bank had filed an application for attachment of the above property on 9-5-2005 to the Recovery Officer, DRT, Hyderabad and the orders of attachment were passed by the Recovery Officer on 24-5-2005. Thereafter, the same was attached before the Sub-Registrar, Mosapeth on 14-6-2005 and proclamation of sale was ordered on 9-9-2005 and notice was published on September 15, 2005 in two local news papers namely Times of India and Andhra Jyothi and subsequently the public auction was conducted on 18-10-2005 and the property was sold in public auction for Rs.5.38 Crores against minimum reserve price of Rs.4.50 Crores for both the plots (Rs.2.25 Crores for each plot) fixed by the Recovery Officer, DRT, Hyderabad."

In a separate affidavit filed on behalf of respondent Nos.3 and 4, Sri S.M.Hussain, Recovery Officer-II of Debts Recovery Tribunal, Hydeabad, has averred that demand notice was issued to all the opposite parties including the petitioner to remit the amount, but they failed to satisfy the decree; that the property in question was attached in accordance with the provisions of the Second Schedule of the 1961 Act, and that notice of the sale proclamation (Form 17) was sent to the petitioner at his address known to the Recovery Officer. According to Sri S. M. Hussain, the auction was conducted on 18-10-2005 as per the provisions of the 1993 Act and the rules. The deponent has also justified the review of order dated 25-11-2005 by asserting that this was done because the purchaser had agreed to pay the entire bid

amount.

In the affidavit filed by Sri Kaparthi Shravan Kumar on behalf of respondent No.5, it has been averred that notice of the original application filed by the bank was issued to the petitioner as per the address given by him at the time of availing the bill discounting facility. Sri Shravan Kumar has alleged that even though the petitioner was aware of the proceedings initiated by the bank, he deliberately remained ex parte. The deponent has referred to the proclamation issued by the Special Judge for Economic Offences, City Criminal Courts, Nampally, Hyderabad under Section 82 of the Code of Criminal Procedure in C.C.Nos.50 to 61 of 2005 to show that the same were issued because the summons issued at his Vijaynagar Colony address could not be served. A copy of the proclamation has been placed on record as Annexure R-2. He has also relied on notice published in English Daily 'Deccan Chronicle' dated 4-2-2006 to substantiate the aforesaid assertion.

The petitioner has filed rejoinders to the counter affidavits of the respondents and reiterated his assertion that ex parte decree was obtained by the bank by deliberately withholding his correct address. He has strongly relied on memo of caveat dated 21-12-2005 filed on behalf of the bank under Section 148-A of the Code of Civil Procedure to show that the bank is aware of his correct address at Vijaynagar Colony, Hyderabad. In paragraphs 5 and 6 of the rejoinder affidavit filed in the context of the averments contained in paragraphs 4 and 5 of the counter affidavit of respondent No.5, the petitioner has set out his version in the following words:

> "5. With regard to paragraph Nos.4 and 5 of the counter affidavit, as I have already submitted, I was not a Executive Director of respondent No.2 Company at the relevant point of time. With regard to the order passed by the Debts Recovery

Tribunal in O.A.No.455/2000, I submit that I have filed petition in DRT in O.A.No.455 of 2000 for setting aside the ex parte decree dated 25-8-2003. I submit that in the application filed by respondent No.1 Bank before the DRT, my address was wrongly shown as Road No.1, Banjara Hills, Hyderabad, whereas my correct residential address is D.No.310/2RT, Vijaynagar Colony, Hyderabad. The respondent No.1 Bank is well aware of the said fact and in spite of knowing my correct address deliberately mentioned the wrong address in the application. As a consequence, no notice was received by me of the proceedings in O.A.No.455/2000 or the notices sent in R.P.No.512/2003. I may point out that respondent No.1 Bank in the caveat filed before this Hon'ble Court has mentioned my correct address and a copy of the caveat petition is received by me at my residential address. A copy of the caveat petition is filed. This shows that respondent No.1 Bank is well aware of my correct residential address and failed to send notices to the said address in the application O.A.No.455/2000 or in subsequent proceedings. In fact, the sale deeds, copies of which are available with DRT, the Recovery Officer and the respondent Bank also show my address as 310, Vijaynagar Colony, Hyderabad. I have been put to irreparable loss and injury and grave hardship on account of respondent No.1 Bank's failure to mention the correct address. All proceedings and orders passed in DRT have been in my absence for no fault of mine. With regard to the postal acknowledgement cards filed by the respondent Bank, as Annexure R1, they relate to date 6-5-2001. I have not signed the postal acknowledgement referred to by the respondent No.5. This is clearly seen from the acknowledgement card itself. I submit that the respondent bank itself has filed a Memo dated 2-5-2005 stating that the notice was not served and sought substituted service. I submit that no notice in C.C.Nos.59 to 61 of 2005 was received by me and the subsequent proclamation under Section 82 of the Criminal Procedure Code issued by the Court of Special Judge for Economic Law and Offences, City Criminal Court, Nampally was recalled on my filing a petition. In the petition I have specifically stated that no summons were received by me at the address D.No.310/2RT,

Vijaynagar Colony, Hyderabad and that the respondent No.5 has got the proclamation issued by suppression of facts to harass and defame me. Copies of the petition are filed herewith. On filing the said petition, the proclamation under Section 82 of the Criminal Procedure Code was recalled. Copy of the orders passed thereto is filed herewith. Therefore, it is incorrect and misleading to suggest that I could not be found at my address. I deny that I was aware of the proceedings initiated by the Bank.

6. With regard to paragraph 6 of the counter affidavit, I submit that in view of the facts stated above, the postal endorsement has no relevance, as the bank knew my correct address and deliberately failed to have notices sent to the said address. Contrary to the allegations of the respondent No.5, the postal endorsement filed by the Bank show "Left". A copy of the Memo is filed. I submit that the conduct of the bank has seriously prejudiced my interests. As a result of the Bank's failure, I was set ex parte in all the proceedings in DRT and also proceedings before the Tax Recovery Officer. In the circumstances, the contention of respondent No.5 that notices were sent to the "Last Known Address" is incorrect and untenable."

Before proceeding further, we may mention that during the pendency of the writ petition, the petitioner has, after obtaining leave from the Court, filed material papers (III Volumes) containing pleadings and various orders including copies of the petitions filed by him under Sections 82 and 83 of the Code of Criminal Procedure for recall of the proclamation and attachment warrants issued by the Special Judge for Economic Offences, Nampally, Hyderabad and orders passed on those petitions, caveat petition dated 21-12-2005 filed by the bank and documents relating to sale of the properties by Sri S.Jaidev. Copies of all the material papers were duly supplied to the counsel for the respondents.

Sri K.Ramakrishna Reddy, learned Senior Counsel argued that

the decree dated 25-8-2003 passed by the Tribunal is liable to be treated as nullity and the consequential proceedings taken by respondent No.3 for auction of the petitioner's property and the sale certificate are liable to be quashed because everything was done in violation of the provisions of the 1993 Act and the rules contained in the Second Schedule of the 1961 Act. Learned counsel emphasised that even though the bank was fully cognizant of the correct address of the petitioner, which has been mentioned in the caveat petition dated 21-12-2005 filed in this Court, the said address was deliberately not given in the original application filed under Section 19 of the 1993 Act and ex parte proceedings were manipulated against the petitioner by giving his address as Road No.1, Banjara Hills, Hyderabad. Sri Reddy submitted that the ex parte decree passed by the Tribunal by presuming that notices have been duly served/deemed to have been served, is liable to be annulled because the address at which the notices were sent to the petitioner was not correct. Sri Reddy further argued that all consequential proceedings taken by respondent No.3, which include issue of notice of demand, attachment orders and proclamation of sale as well as the auction proceedings are liable to be quashed because none of the notices issued by respondent No.3 could be served on the petitioner due to wrong address and the bank manipulated reports suggesting that the addressee has refused or avoided to accept the notices. Learned counsel relied on the provisions contained in Part III of the Second Schedule of the 1961 Act and argued that all the actions taken by respondent No.3 are replete with gross violation of the provisions contained in Rules 48, 49, 53, 54, 63, 67 and 87, inasmuch as the petitioner was never made aware of the demand notice, attachment orders, proclamation of sale and the actual auction. Learned counsel then argued that after having

cancelled the sale of property on the ground that the same was tainted by irregularities, respondent No.3 could not have reviewed order dated 25-11-2005 without giving notice to the petitioner, who was very much interested in protecting his property. Sri Reddy lamented that the bank connived with the Managing Director of respondent No.2, Sri S.Jaidev and deliberately refrained from effecting recovery of the due amount from him and allowed him to dispose of all the properties after one year of the decree passed by the Tribunal. In support of his arguments, Sri Reddy relied on the judgment of the Supreme Court in **Manmohanlal v. I.T.O.**[1] and the judgment of Orissa High Court in **Sunil Kumar Singh Deo v. T.R.O.**[2].

Sri S.R.Ashok, learned Senior Counsel argued that the petitioner's complaint regarding non-service of notice is wholly untenable because notices of the criminal proceedings instituted by the bank, which were issued at his Vijaynagar Colony address were returned unserved necessitating issue of proclamation by the learned Special Judge for Economic Offences, Nampally, Hyderabad. Learned counsel emphasised that the petitioner had deliberately avoided receipt of notices issued by the Tribunal and respondent No.3 and, therefore, ex parte decree passed in favour of the bank and the consequential proceedings taken by respondent No.3 cannot be nullified on the ground of violation of the rules of natural justice. In support of his arguments, Sri S.R.Ashok relied on the judgments of the Supreme Court in **Janak Raj v. Gurdial Singh**[3] and **Homely Industries v. S.T.Officer Kanpur**[4]. Learned Senior Counsel further argued that the writ petition is liable to be dismissed because the application filed by the petitioner for setting aside the ex parte decree dated 25-8-2003 is pending before the Tribunal and

also because an effective alternative remedy is available to the petitioner under Rule 61 of the Second Schedule for setting aside the sale of his property.

We have given serious thought to the respective arguments. Although we are prima facie inclined to agree with Sri K. Ramakrishna Reddy that ex parte decree dated 25-8-2003 passed by the Tribunal is vitiated due to violation of the basics of natural justice because the address of the petitioner given in the original application filed by the bank was not correct and, on that account, the notice could not be served on him, but we do not consider it proper to express conclusive opinion on this issue because the matter is pending before the Tribunal. Indeed, in the affidavit filed on behalf of the bank, it has not been disputed that in the caveat petition filed under Section 148-A CPC, the petitioner's address was given as resident of 10-2-289,120/45,310 RT, Vijaynagar Colony, Hyderabad, and in the application filed under Section 19(1) of the 1993 Act, his address was mentioned as Rank Aqua Estates Ltd., Road No.1, Banjara Hills, Hyderabad, which is the address of respondent No.2. However, no explanation is forthcoming as to why the petitioner's residential address was not given in the original application filed by the bank as also the application filed by it under Section 19(12) of the 1993 Act, the orders of attachment and the sale proclamation issued by respondent No.3. In our opinion, as a consequence of the wrong address given in the original application and other proceedings, none of the notices could be served on the petitioner. The postal authorities returned the notices with the report that the addressee is not available. The Tribunal held ex parte proceedings against the petitioner by assuming that despite service of notice, he has failed to appear. Respondent No.3 also issued orders of attachment and conducted sale

proceedings by assuming that the petitioner was not prepared to participate in the proceedings initiated by him in furtherance of recovery certificate issued by the Tribunal. The argument of Sri S.R.Ashok that the petitioner was aware of the proceedings initiated by the bank and respondent No.3, but he had deliberately avoided acceptance of notice and feigned ignorance about the application filed by the bank and the proceedings held by respondent No.3 for sale of the property sounds attractive, but lacks substance. The record produced by the petitioner before this Court shows that summons issued by the Court of Special Judge for Economic Offences, Nampally, Hyderabad were not served upon him and the proclamation issued by the concerned court was recalled when this fact was brought to the notice of the concerned court.

We also find force in the submission of the learned counsel for the petitioner that the proceedings held by respondent No.3 i.e. issue of demand notice, attachment orders and proclamation of sale are replete with violation of the provisions contained in the Second Schedule of the 1961 Act and the same are liable to be quashed on that ground. At the cost of repetition, we are inclined to observe that neither the demand notice nor notice of the application filed by the bank under Section 19(12) of the 1993 Act could be served on the petitioner because his address given in the application and other proceedings was wrong.

We may now notice Section 29 of the 1993 Act and Rules 2, 48, 49, 50, 60, 61 and 87 of the Rules contained in the Second Schedule of the 1961 Act. The same read as under:

> **“1993 Act**
>
> **29. Application of certain provisions of Income-tax Act. –** The provisions of the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate

Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the income-tax:

Provided that any reference under the said provisions and the rules to the "assessee" shall be construed as a reference to the defendant under this Act.

Second Schedule of the 1961 Act

Issue of notice.

2. When a certificate has been drawn up by the Tax Recovery Officer for the recovery of arrears under this Schedule, the Tax Recovery Officer shall cause to be served upon the defaulter a notice requiring the defaulter to pay the amount specified in the certificate within fifteen days from the date of service of the notice and intimating that in default steps would be taken to realize the amount under this Schedule.

Attachment.

48. Attachment of the immovable property of the defaulter shall be made by an order prohibiting the defaulter from transferring or charging the property in any way and prohibiting all persons from taking any benefit under such transfer or charge.

Service of notice of attachment.

49. A copy of the order of attachment shall be served on the defaulter.

Proclamation of attachment

50. The order of attachment shall be proclaimed at some place on or adjacent to the property attached by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and on the notice board of the office of the Tax Recovery Officer.

Application to set aside sale of immovable property on deposit.

60. (1) Where immovable property has been sold in execution of a certificate, the defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale, on his depositing –

(a) the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, with interest thereon at the rate of fifteen per cent per annum, calculated from the date of the proclamation of sale to the date when the deposit is made; and

(b) for payment to the purchaser, as penalty, a sum equal to five per cent of the purchase money, but not less than one rupee.

(2) Where a person makes an application under Rule 61 for setting aside the sale of his immovable property, he shall not, unless he withdraws that application, be entitled to make or prosecute an application under this rule.

Application to set aside sale of immovable property on ground of non-service of notice or irregularity.

61. Where immovable property has been sold in execution of a certificate, such Income-tax Officer as may be authorised by the Chief Commissioner or Commissioner in this behalf, the defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale of the immovable property on the ground that notice was not served on the defaulter to pay the arrears as required by this Schedule or on the ground of a material irregularity in publishing or conducting the sale:

Provided that –

(a) no sale shall be set aside on any such ground unless the Tax Recovery Officer is satisfied that the applicant has sustained substantial injury by reason of the non-service or

irregularity; and

(b) an application made by a defaulter under this rule shall be disallowed unless the applicant deposits the amount recoverable from him in the execution of the certificate.

Review.

87. Any order passed under this Schedule may, after notice to all persons interested, be reviewed by the Chief Commissioner or Commissioner, Tax Recovery Officer or other officer who made the order, or by his successor in office, on account of any mistake apparent from the record."

A conjoint reading of the above reproduced provisions makes it clear that service of notice upon the defaulter requiring him to pay the amount specified in the recovery certificate is sine qua non for taking further proceedings including attachment and sale of immovable property of the defaulter. Rules 60 and 61 provide two-fold remedies to the person whose interests are affected by the sale. In the first place, he can request the Recovery Officer to set aside the sale by depositing the amount specified in the proclamation with interest and by paying 5% of the purchase money to the purchaser by way of penalty. Secondly, he can apply for setting aside the sale on the ground of non-service of notice or irregularity. Rule 87 empowers the Recovery Officer to review the order after giving notice to the interested person.

In the present case, notice of the proceedings initiated by respondent No.3 was not served on the petitioner. He was also not served with the order of attachment and, as a result of that, he could not take steps either to seek annulment of the ex parte decree passed by the Tribunal by depositing the amount specified in its order or otherwise. The fact that the sale proceedings were tainted by irregularities is established by order dated 24-11-2005 passed by the

Presiding Officer of the Tribunal and order dated 25-11-2005 passed by respondent No.3. The review of the last mentioned order by respondent No.3 is clearly vitiated due to violation of Rule 87 of the Second Schedule of the 1961 Act, because it was not preceded by any notice to the interested person including the petitioner.

The argument of Sri S.R. Ashok that an effective alternative remedy is available to the petitioner by filing an application under Rule 61 of the Second Schedule of the 1961 Act, also appears attractive, but in the facts of this case, we are not inclined to relegate the petitioner to that remedy because we are convinced that the proceedings initiated by respondent No.3 are vitiated due to patent violation of the rules of natural justice and the petitioner's case falls within one of the exceptions culled out by the Supreme Court in **Baburam v. Zilla Parishad**[5] and **Harbanslal Sahnia v. Indian Oil Corporation Ltd.**[6]. In the latter decision, the Supreme Court laid down the following propositions:

> "The rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: *i*) where the writ petition seeks enforcement of any of the fundamental rights; (*ii*) where there is failure of principles of natural justice; or (*iii*) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See **Whirlpool Corpn. v. Registrar of Trade Marks {(1998) 8 SCC 1}**. The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."

In the result, the writ petition is allowed. The auction held by respondent No.3 on 18-10-2005 and sale certificate issued in favour of respondent No.5 are declared as nullity and are quashed. However, liberty is given to the bank and respondent No.3 to initiate fresh proceedings for recovery of the dues in terms of the decree passed by the Tribunal subject, of course, to the order, which may be made by the Tribunal on the application filed by the petitioner for setting aside the ex parte decree.

G.S.SINGHVI, C.J.

17th January, 2007

G.BHAVANI PRASAD, J.

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[1] 1987 (Supp) SCC 760
[2] (1987) 166 ITR 882
[3] AIR 1967 SC 608
[4] AIR 1976 SC 2086
[5] AIR 1969 SC 556
[6] (2003) 2 SCC 107